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ALEXANDER L. STEVAS,

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST TEXAS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

TINA BENNETT, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 81-1398

TINA BENNETT, *et al.*,
Plaintiffs-Appellants

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

January 31, 1983

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

This appeal challenges a summary judgment of dismissal in a class action charging sex discrimination in the intercollegiate athletics program at West Texas State University. Plaintiffs alleged in their complaint that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.,[1] was violated by the various policies and practices

[1] Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681. After this general prohibition come nine exceptions to coverage, none of which are relevant to the instant case.

which discriminate against women by denying them equal opportunity in the university intercollegiate athletics program.

It is undisputed that West Texas State University receives a great deal of federal money. The dispute in this case centers around the exact type of federal financial assistance which triggers the provisions of Title IX. There are two theories on this issue, as the district court recognized in its opinion.

> The Defendants have argued that the exact language of Title IX itself is controlling and, thus, that only if an athletic program or activity directly receives federal financial assistance must there be no discrimination. This is what has been referred to as the "programmatic approach." Plaintiffs assert, to the contrary, that what is prohibited is "institutional" discrimination, i.e., that if an institution receives federal funds, then there may not be any discrimination in any of its programs or activities, regardless of whether that program or activity itself receives the federal aid. This is the approach taken by the regulations.

Record on Appeal, vol. 2, at 343-44.

The court below ruled adversely to plaintiffs, holding first that the institutional approach was invalid and second, that the plaintiffs had not demonstrated receipt of the "direct" funds necessary to trigger Title IX under the programmatic approach. Without anticipating the decision of the Fifth Circuit on these issues, we simply hold today that the plaintiffs must be permitted to present a case on the receipt of direct funds by the athletics department. Plaintiffs contend that the athletics program does indeed receive direct funds including work-study employment assistance to students who are employed in the athletics department,

compulsory student fees which support the athletics program and subsidized housing for athletes. At this point in the development of the case, plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified. They must be permitted to do so. In addition, they should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program.

For the foregoing reasons, we reverse and remand for further consideration consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

Civ. A No. CA 2-80-0073

TINA BENNETT, *et al.*,

Plaintiffs

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,

Defendants

MEMORANDUM ORDER GRANTING SUMMARY JUDGMENT

July 27, 1981

ROBERT W. PORTER, District Judge.

The named Plaintiffs in this action are six female students at West Texas State University in Canyon, Texas, who participate in the University's intercollegiate athletics program. The Defendants are the University as well as various individuals who are responsible for the administration of the University's affairs, including but not limited to the intercollegiate athletics program.

The Plaintiffs, on behalf of themselves and as representatives of the class that has heretofore been certified, have

alleged that the Defendants maintain various policies and practices which discriminate against women on the basis of sex and which deny women equal opportunity in the University's intercollegiate athletics program. The Plaintiffs contend that such policies and practices have had the effect of excluding Plaintiffs from full participation in, denying Plaintiffs the benefits of, and subjecting Plaintiffs to discrimination in an athletic program or activity receiving federal financial assistance, and thus that such policies and practices are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (hereinafter Title IX) and the regulations promulgated thereunder, 34 C.F.R. § 106.1 *et seq.* (originally codified at 45 C.F.R. § 86.1 *et seq.*).

It is the Defendants' position that the intercollegiate athletics program does not receive federal financial assistance, and therefore that the program is outside the scope of Title IX. The Defendants also contend that, to the extent the referenced regulations purport to apply to the University's intercollegiate athletic program irrespective of the absence of direct federal financial assistance to that specific program, those regulations are beyond the statutory authority granted under Title IX and are invalid.

The Defendants have filed a motion for summary judgment, to which the Plaintiffs have duly responded. After hearing and careful consideration of the briefs and arguments of counsel, I am of the opinion, for the reasons set out below, that the Defendants are entitled to summary judgment as a matter of law.

I.

The portion of Title IX at issue here is Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681, which provides in pertinent part, that

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance....

The regulations, 34 C.F.R. § 106.1, which have been promulgated by the Department of Education pursuant to Title IX, provide as follows:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any intercollegiate, club, or intramural athletics offered by a *recipient*, and no recipient shall provide any such athletics separately on such basis. (emphasis added).

The resolution of Defendants' motion for summary judgment is dependent upon the meaning and effect of these two provisions and their relationship to one another. The Defendants have argued that the exact language of Title IX itself is controlling and, thus, that only if an atheltic program or activity directly receives federal financial assistance must there be no discrimination. This is what has been referred to as the "programmatic approach." Plaintiffs assert, to the contrary, that what is prohibited is "institutional" discrimination, i.e., that if an institution receives federal funds, then there may not be any discrimination in any of its programs or activities, regardless of whether that program or activity itself receives the federal aid. This is the approach taken by the regulations.

II

An examination of the various sections of Title IX indicates that the drafters of this legislation were very aware of the distinction between the programmatic and institutional approaches. For example, 20 U.S.C. § 1682, the provision by which the agency and the courts are to determine the permissible scope of any regulations instituted to effectuate Title IX, limits the agency's authority to promulgate rules and regulations to include only those programs or activities receiving federal financial assistance:

> Each federal department . . . which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders. (emphasis added).

Section 1682 also contains an enforcement provision which provides for termination of federal financial assistance, which is limited to particular programs or activities which receive federal funds. These provisions obviously embody a programmatic approach and should be contrasted with the institutional approach used elsewhere in the same title. 20 U.S.C. § 1684, dealing with impaired vision states that:

> No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a *recipient* of Federal financial assistance for any education program or activity. (emphasis added).

The precise selection of the terms "programs" and "recipient" throughout the various sections of Title IX evidence the clear intent of Congress that Sections 1681 and

1682 and the regulations thereunder apply only to specific programs or activities which receive direct financial assistance.

A review of the legislative background of Title IX supports this conclusion. The original Senate version of Title IX was institutional in nature. It provided that

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by a public institution which is a reciepient of Federal financial assistance for any education program or activity.

117 Cong.Rec. 30156 (1971). This version of Title IX was subsequently rejected and in its stead the present program specific version was enacted. Again, this is clear evidence of the intent of Congress to limit the scope of Title IX.

The courts which have grappled with this issue have ruled consistently with the Congressional interpretation. Most persuasive to this Court in the Fifth Circuit's holding in *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). In that case the Secretary of Health, Education and Welfare had promulgated regulations which prohibited any school receiving federal financial assistance from engaging in sexual discrimination in employment practices. The regulations were not limited to those employees who were compensated out of federal funds or who worked in programs receiving federal assistance, but they applied to all employees of the entire school system so long as any program or activity of the school received federal financial assistance. The court found the regulations invalid, emphasizing that:

> [w]e cannot find sanction in the statute for this conclusion that any discrimination in an entire school system

> so taints the system as to permit termination of all federal aid even though federally assisted programs are administered impeccably. The regulations attempt to regulate sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly. . . . Further evidence that the regulations must be keyed to a specific program is found in the enforcement provisions.

622 F.2d at 737. *Accord, Seattle University v. Department of Health, Education and Welfare,* 16 F.E.P. 719 (W.D. Wash. 1978), *aff'd* 621 F.2d 992 (9th Cir. 1980), *cert. granted sub. nom. United States Department of Health, Education and Welfare v. Seattle University,* 449 U.S. 1009, 101 S.Ct. 563, 66 L.Ed.2d 467 (1981); *Romeo Community Schools v. Department of Health, Education and Welfare,* 438 F.Supp. 1021 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Junior College District of St. Louis v. Califano,* 597 F.2d 119 (8th Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Islesboro School Committee v. Califano,* 593 F.2d 424 (1st Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 387 (1979). The Fifth Circuit's determination that Title IX governs the conduct of a program only if that specific program receives Federal financial assistance is binding on this court.[1] The clear language

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[1]Most of the cases interpreting Title IX have arisen in the context of challenges to regulations under Title IX relating to employment discrimination. I am aware of only one other court that has been directly confronted with the difficult and sensitive task of applying Title IX and its regulations to a school's athletic programs. *Othen v. Ann Arbor School Board,* 507 F.Supp. 1376 (E.D. Mich. 1981). Judge Joiner's analytical opinion cogently

of Title IX and the intent of Congress require that the Act be applied programmatically. To the extent that the regulations attempt to apply the strictures of Title IX on an institutional basis, the regulations are invalid.

III.

Although I have held that Title IX is applicable only to those specific programs and activities which receive direct federal assistance, Plaintiffs contend that there is a genuine issue of fact as to whether the University's athletic programs receive direct federal aid. Clarence E. Thompson, the Business Manager and Chief Financial Officer of West Texas State University, has submitted an affidavit which asserts that the intercollegiate athletics program maintained by the University does not receive any direct financial assistance of any nature from the federal government. The Plaintiffs argue, however, that various depositions taken in the case reflect that the athletic programs benefit from the fact that students receive veteran's benefits, Basic Educational Opportunity Grants, federal work-study program benefits and other federal financial aid. Plaintiffs also assert that the university receives federal aid for building dormitories and dining halls which parti-

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addresses issues identical to ones raised in the case at bar, and I unreservedly endorse his reasoning and holding.

Of particular import to my holding here is Judge Joiner's analysis of the relationship between Title IX and Title VI of the Civil Rights Act of 1964. While recognizing that the Supreme Court has held in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), that Title IX is to be construed in accordance with Title VI, Judge Joiner relied heavily on *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), in holding that Title IX is programmatic in nature. *Finch*, which held that Title VI is programmatic in nature, is of course binding authority on this Court.

cularly benefit athletes. Plaintiffs' contention is, in essence, that the athletic programs of the University are directly benefited by federal financial assistance because those programs receive funds that would otherwise be diverted without the infusion of federal monies.

Plaintiffs' argument that such aid constitutes a direct benefit to the atheletics programs is not well-taken. All the types of federal aid enumerated by the Plaintiffs are general and nonspecific, and such aid is indirect by nature. The type of assistance relied on by Plaintiffs results in some benefit, however remote and indirect, to every program at West Texas State University. Were the Court to adopt Plaintiffs' argument, the programmatic construction of Title IX would be rendered nugatory, because every program or activity at the university would be subject to Title IX. The Act itself compels a different conclusion. In order for the strictures of Title IX to be triggered, the federal financial assistance must be direct. *Othen v. Ann Arbor School Board,* 507 F.Supp. 1376 (E.D.Mich.1981); *Stewart v. New York University,* 430 F.Supp. 1305 (S.D.N.Y.1976). The type of indirect aid received by the University athletic programs does not bring them within the ambit of Title IX.

IV.

Therefore, in accordance with the foregoing opinion, it is

ORDERED that Defendants motion for summary judgment be and hereby is in all things GRANTED.

APPENDIX C

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 81-1398

D. C. Docket No. CA-2-80-73

TINA BENNETT, *et al.*,

Plaintiffs-Appellants,

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before GARZA, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

January 31, 1983

ISSUED AS MANDATE:

APPENDIX D

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 81-1398

TINA BENNETT, *et al.*,

Plaintiffs-Appellants

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

February 23, 1983

ON PETITION FOR REHEARING

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

In our prior unpublished opinion in this action, we reversed the grant of summary judgment and ordered the district court to permit plaintiffs to make a record of the direct funding that comes to the athletics department from the sources previously identified by plaintiffs. We also ruled that "[i]n addition, they should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program." On rehearing, we withdraw that sentence from the opinion. In all other respects, the rehearing is denied.

DENIED.

APPENDIX E

TITLE IX, EDUCATION AMENDMENTS OF 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. § 1681, *et seq.*, as amended

SEX DISCRIMINATION PROHIBITED

Sec. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) this section shall not apply to membership practices —

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) this section shall not apply to —

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation

conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for —

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons

of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

FEDERAL ADMINISTRATIVE ENFORCEMENT

Sec. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal

shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

JUDICIAL REVIEW

Sec. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

Sec. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

EFFECT ON OTHER LAWS

Sec. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

AMENDMENTS TO OTHER LAWS

Sec. 906. (a) Sections 401(b), 407(a) (2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c-6(a) (2), 2000c-9, and 2000h-2) are each amended by inserting the word "sex" after the word "religion".

(b) (1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203 (r) (1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

(3) Section 3(s) (4) of such Act (29 U.S.C. 203(s) (4)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

Sec. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

CERTIFICATE OF SERVICE

This is to certify that, on the 13 day of April, 1983, three copies of the foregoing Supplemental Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondents by placing the same in the United States mails, certified mail, postage prepaid, addressed to their attorneys of record as follows:

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